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August 5, 2021
FILING VIA ONE DRIVE

The Honorable Daniel Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
Aug 05 2021
S.C. SUPREME COURT

In re: Richard J. Creswick v. The University of South Carolina and Alan Wilson in his
official capacity as Attorney General

Dear Mr. Shearouse:

Enclosed please find a Rule 245(c) Notice and Petition for Original Jurisdiction, Expedited
Disposition, and Emergency Declaration in connection with the above-referenced matter.

With warmest personal regards, I am

Sincerely,

s/Christopher P. Kenney

Christopher P. Kenney

CPK:hm
Enclosures

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Aug 05 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

In the Original Jurisdiction

Richard J. Creswick.....Petitioners,

v.

The University of South Carolina and
Alan Wilson in his official capacity as Attorney General.....Respondents,

RULE 245(c) NOTICE

TAKE NOTICE, pursuant to Rule 245(c) of the South Carolina Appellate Court Rules, that you are required to file a return to this Petitioners petition for original jurisdiction within 20 days from the date of service. Failure of a party to timely file a return may be deemed a consent by that party to the matter being heard in the original jurisdiction.

Respectfully submitted by,

s/Christopher P. Kenney
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Christopher P. Kenney (SC Bar No. 100147)
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ATTORNEYS FOR PETITIONER
RICHARD J. CRESWICK

August 5, 2020
Columbia, South Carolina.

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Aug 05 2021

S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

In the Original Jurisdiction

Richard J. Creswick.....Petitioners,

v.

The University of South Carolina and
Alan Wilson in his official capacity as Attorney General.....Respondents,

**PETITION FOR ORIGINAL JURISDICTION,
EXPEDITED DISPOSITION, AND EMERGENCY DECLARATION**

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ATTORNEYS FOR PETITIONER
RICHARD J. CRESWICK

August 5, 2020
Columbia, South Carolina.

The simplicity of this dispute is underscored only by its gravity. The coronavirus pandemic is rising again, this time with a new, more contagious strain of the disease capable of breaking through otherwise highly efficacious vaccines and being spread by vaccinated and unvaccinated alike. Respondent University of South Carolina responded to new public health guidance by enacting a universal masking policy for classes starting on August 19, 2021—a measure that would keep everyone inside campus buildings safe by preventing transmission of the Delta variant.

Respondent Alan Wilson intervened. Citing Proviso 117.190 of the Appropriations Act of 2021–22, he claimed there was ambiguity where there is none, and then offered his own view the proviso should be read to prohibit public institutions of higher learning from requiring universal masking during in-person classroom instruction or other congregate functions that are a routine part of university life. Yet, the totality of the one-year budget instruction simply reads:

117.190. (GP: Masks at Higher Education Facilities) A public institution of higher learning, including a technical college, may not use any funds appropriated or authorized pursuant to this act to require that its students have received the COVID-19 vaccination in order to be present at the institutions facilities without being required to wear a facemask. This prohibition extends to the announcement or enforcement of any such policy.

2021 Act No. 94, Part 1B, § 117.190. Thus, the proviso prohibits unvaccinated persons from being singled out to wear a mask on campus. But the Attorney General’s interpretation contorts this non-discrimination provision to prohibit all masking—a reading far beyond the text and contrary to what public health authorities in this State and across the Nation have required and still require in congregate settings to stop COVID-19 transmission while public life continues.

No great act of construction is required here; the Attorney General is plainly wrong and has created a controversy where none should exist. Regrettably, the University acceded to the Attorney General’s demand and revoked its universal mask mandate while acknowledging its importance and pleading for voluntary compliance. Thus, the Attorney General’s performative act

of legal coercion has put particle astrophysics professor Petitioner Richard J. Creswick, his immunocompromised wife, the University's faculty, staff, and students, and the surrounding community all unnecessarily at risk at the very moment public health officials are urging public masking and increased vigilance.

This petition for original jurisdiction seeks to end this manufactured legal controversy and allow the University to follow public health guidance free from the threat of legal coercion by the State's top lawyer. The case is submitted pursuant to article V, § 5 of the Constitution, South Carolina Code § 14-3-310, and Rule 245 of the South Carolina Appellate Court Rules. Petitioner seeks (1) leave to file the proposed complaint (**Exhibit A**); (2) an order expediting Respondents' time to file a return and/or answer; (3) (if necessary) expedited discovery; and (4) an expedited hearing and decision declaring that Proviso No. 117.190 does not prohibit the University or any other public institution of higher learning from enacting a universal mask mandate inside campus buildings. Because fall classes begin on August 19, 2021, time is of the essence.

FACTUAL BACKGROUND

The relevant factual background is detailed in Petitioner's proposed verified complaint, which is attached as **Exhibit A** and incorporated here as if set forth verbatim.

STANDARD OF REVIEW

When appropriate, the Court will consider matters in its original jurisdiction when the public interest is involved or if special grounds of emergency or other good reasons exist, and the matter cannot be considered by a lower court first without material prejudice to the rights of the parties. Rule 245(a), SCACR.

GROUNDS FOR GRANTING THE PETITION

The petition should be granted because the natural and certain consequence of failing to correct the Attorney General's flawed legal theory is transmission of the highly contagious Delta variant in congregate classroom settings among vaccinated and unvaccinated alike, which will cause serious illness and death, and prolong the COVID-19 pandemic.

The petition addresses three points below. First, the Attorney General's construction is neither necessary nor reasonable. No construction is required because the text is clear, and the construction he offers makes no sense. Second, original jurisdiction is appropriate because this is a matter of public importance that affects the State's largest university, the surrounding community, and every public institution that might seek to curb the spread of the most dangerous strain of coronavirus we have faced during this pandemic. Third, Prof. Creswick has standing to bring this action on the Court's original jurisdiction because this is a matter of public importance, the controversy is concrete and, as an employee of the University, he has an immediate and personal stake in it that should be redressable before this Court.

I. Proviso No. 117.190 requires no construction and the Attorney General's construction creates new law where none exists.

The Court should conclude that Proviso No. 117.190 simply prohibits a mask mandate that discriminates against the unvaccinated but does *not* prohibit a universal mask mandate and that the Attorney General's contrary view violates the rules of statutory construction.

Resolving statutory construction questions turns on discerning legislative intent. Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017) (collecting cases). "If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. (bracket and quotations omitted, quoting Brown v. Bi-Lo, Inc., 354 S.C. 436, 439, 581 S.E.2d 836, 838

(2003) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))). Only when a statute is ambiguous does a court construe it in an effort to discern the legislature’s intent, and that construction must give the statute as a whole a “practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” Id.

The Attorney General’s position departs from these rules on all counts. Consider his letter to University President Harris Pastides. See Ex. A at Ex. 1. First, the Attorney General professes concern that the University’s masking policy violates Proviso Nos. 117.163 and 117.190. He explains Proviso No. 117.163 to “prohibit[] institutions of higher learning receiving directly or indirectly appropriated funds to require proof of a COVID-19 vaccination as a condition of enrollment or attendance.” Ex. A at Ex. 1, p. 1. He describes Proviso 117.190 to “similarly provide[] that appropriated funds may not be used to require a vaccination [sic] to be present at the institution’s facilities ‘without being required to wear a facemask.’” Id. Presumably, he meant to say, “may not be used to require *an unvaccinated person* to be present ... without being required to wear a facemask” because what the proviso, in fact, says is “may not use any funds appropriated or authorized pursuant to this act to require that its students have received the COVID-19 vaccination in order to be present at the institutions facilities without being required to wear a facemask.” 2021 Act No. 94, Part 1B, § 117.190. He then concludes “the Legislature intended these Provisos to bar use of State-appropriated funds to mandate COVID-19 vaccinations *or the wearing of facemasks*.” Ex. A at Ex. 1, p. 1 (emphasis added).

This conclusion flows from a series of misrepresentations and non-sequiturs. For instance, he claims Proviso 117.190 “is ambiguous, to be sure.” Ex. A at Ex. 1, p. 2. It is not. In the very next sentence, he acknowledges the plain reading: “One reasonable interpretation is to prohibit discrimination by requiring masks for the unvaccinated. Under this interpretation, a uniform mask

requirement does not violate the Proviso.” Id. Exactly—that is precisely what the proviso requires. Nevertheless, the Attorney General continues “[s]uch a policy, however, is not consistent with the intent of the Legislature”, contending further that Proviso No. 117.190 “was intended to prohibit the mandatory wearing of masks, as reflected in its use of the language ‘without being required to wear a facemask.’” Id. He then cites Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) for the proposition that courts are not confined to a statute’s literal meaning when it contradicts the real purpose and intent of lawmakers. Ex. A at Ex. 1, p. 2.

This reasoning is deeply flawed for three reasons. First, the proviso says what it says and even the Attorney General acknowledges the proper reading to simply prohibit a mask mandate that discriminates against the unvaccinated. There is no ambiguity, so there is no need to construe the statute. Second, he *creates* the ambiguity by selectively quoting one clause from the proviso while excluding the predicate. Applying this sort of “reasoning” renders *every* statute subject to construction. It is not serious lawyering, and it shows no respect for the rule of law or the idea that words and laws have meaning. Third, to the extent there was some ambiguity, one might look (for instance) to Proviso No. 117.163, which reads in full:

117.163. (GP: COVID-19 Proof of Vaccination Restriction - Institutions) For the current fiscal year, state-supported institutions of higher learning that directly or indirectly receive funds appropriated or authorized through the general appropriations act shall be restricted from requiring proof of COVID-19 vaccination for any student as a condition of enrollment, attendance at on campus instruction, or residence on campus. In instances of off-campus learning events for which third party program providers require proof of vaccination, the third party requirements shall apply.

2021 Act No. 94, Part 1B, § 117.163. This provision prohibits discriminatory treatment of the unvaccinated, which is entirely consistent with the discriminatory masking prohibition in Proviso No. 117.190. Put differently, to the extent it was necessary to hunt for evidence of what the General

Assembly intended as to Proviso No. 117.190, Proviso No. 117.163 is strong evidence that what the legislature was concerned with was *disparate* treatment of the unvaccinated.

The Attorney General's approach leads to the type of "plainly absurd" result that the Court's construction jurisprudence has always sought to avoid. Cf. Hodges, 341 S.C. at 91, 533 S.E.2d at 584 (explaining plain meaning analysis is rejected only when it "would lead to a result so plainly absurd that it could not possibly have been intended"). Indeed, that is the lesson from Wade, where the Court reasoned the legislature did not intend for a statute revoking inmate credits for testifying falsely to apply to post-conviction relief cases because doing so would cause a disparate impact by allowing the State to punish incarcerated prisoners for asserting constitutional rights, but non-incarcerated applicants could do so without fear of reprisal. 348 S.C. at 259–61, 559 S.E.2d at 845. Notably, this rare departure from a statute's literal meaning turned not on the "phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." See id. at 259, 559 S.E.2d at 845.

The Attorney General has done just the opposite: he fixates on one clause out of context and the cites Wade as authority to ignore plain meaning. There is no precedent for such an absurdist approach and the Court should hold accordingly.

II. The Court should exercise original jurisdiction because this is an emergency matter of great public interest that cannot be resolved first by the circuit court.

"Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction." Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). The common thread in original jurisdiction jurisprudence is an effort to resolve conflicting claims of government power with broad impact on the State and public. For example, original jurisdiction has been held to exist to decide whether a budget proviso violated the S.C. Constitution's one-subject rule. S.C. Pub. Interest Found. v. Lucas, 416 S.C. 269,

786 S.E.2d 124 (2016). Original jurisdiction has also been exercised to clarify the effective date of a new constitutional amendment, Davis v. Leatherman, 419 S.C. 44, 796 S.E.2d 137 (2017), to decide whether a governor had power to make recess appointments, Senate v. McMaster, 425 S.C. 315, 821 S.E.2d 908 (2018), and to remove a board member from a public utility. Hodges, 341 S.C. 79, 533 S.E.2d 578.

This matter implicates those same concerns, but the stakes are far higher. Like Lucas, it concerns a disputed budget proviso and like Davis, McMaster, and Hodges, it asks whether a government actor has eclipsed the scope of his power. Attorneys general in this State have long opined on legal matter to give guidance to other public officials and public bodies. E.g., S.C. Code Ann. § 1-7-90 (authorizing opinions on question of law submitted by the Governor or branch of the legislature). But the Attorney General’s interpretive act here is separate and apart from that ordinary function; he has given new meaning and intent to a law that required neither. It is more akin to writing law than interpreting it, a power reserved for the General Assembly. If an attorney general can quite literally give entirely new meaning to otherwise plain words, and then use his own interpretation to coerce other departments of the government to conform to that view, then the power of that office is far greater than the legislature acting as a whole. Not even the Court—a coequal branch—claims such authority. Cf. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (“Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”).

Further, the stakes of this dispute are literally a matter of life and death. Medical science is clear that masking dramatically reduces the transmission rate of COVID-19 and the most recent public health data indicates the Delta variant is being contracted and spread by vaccinated persons.

See Ex. A ¶¶ 13–17. The University did the right thing—it followed the facts—but has been frustrated by the Attorney General. By comparison, this dispute is certainly more consequential to the public health and welfare than the one-subject rule, recess appointments, or the board member’s tenure at a public utility. The better analogs here are the Court’s decisions last year to *twice* grant original jurisdiction to consider the sufficiency of election procedures to protect vulnerable voters from contracting the coronavirus at the polls. See Bailey v. S.C. State Election Comm’n, 430 S.C. 268, 844 S.E.2d 390 (2020); Duggins v. Lucas, 431 S.C. 115, 115, 847 S.E.2d 793 (2020), reh’g denied (Sept. 30, 2020). In light of the University’s decision to accede to the Attorney General’s demand, this dispute rises to that same level of urgency and public interest.

In-person instruction at the University resumes in just 14 days with other public institutions also reconvening and unable to order universal masking. The Court is the only forum capable of decisively ending this controversy and giving statewide guidance to all public institutions.

III. Prof. Creswick has standing.

Finally, the Attorney General is likely to defend this claim on the grounds that it should not be heard because Prof. Creswick lacks standing. That is not correct. A litigant can have standing to sue (1) by statute, (2) through the rubric of constitutional standing, or (3) under the “public importance” exception. ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Here, Prof. Creswick has constitutional and public importance standing.

A. Constitutional standing.

Constitutional standing exists where a plaintiff has an injury in fact, a causal connection between the conduct and the injury, and can redress that injury with a favorable judicial decision. ATC S., 380 S.C. at 195, 669 S.E.2d at 339 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555,

560–61 (1992)). Under this standard, the injury must be sufficiently concrete and particularized, not speculative or hypothetical. Id. All of these elements are met here.

Prof. Creswick has a real, concrete, scientifically measurable fear that the Attorney General’s disallowance of the University’s universal mask mandate will cause him to contract the Delta variant. See Ex. A ¶¶ 9–17 (detailing public health findings about Delta). Contracting the virus not only places him at risk, but it also places his immunocompromised spouse at risk while she continues being treated for cancer. Id. ¶¶ 26–28. These are real and tangible harms that will flow from requiring Prof. Creswick to expose himself to unmasked, unvaccinated individuals in a congregate classroom setting and comports with the Court’s directive that “a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.” ATC S., 380 S.C. at 196, 669 S.E.2d at 339 (quoting Evins v. Richland County Historic Pres. Comm’n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)). Further, granting Prof. Creswick relief by declaring that Proviso No. 117.190 does not prohibit a universal mask mandate is almost certain to redress the injury since the University has already attempted to follow CDC’s guidance by ordering universal, indoor masking and would likely reinstate the mandate in response to a favorable declaration by the Court.

Accordingly, the Court should conclude that Prof. Creswick has constitutional standing.

B. Public importance standing.

Prof. Creswick also has standing under the public importance exception to the standing doctrine. Under the public importance exception, “standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance ... without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.” ATC S.,

380 S.C. at 198, 669 S.E.2d at 341 (quoting Davis v. Richland County Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)).

Here, Prof. Creswick has an interest greater than other potential plaintiffs: his own health and that of his immunocompromised spouse. Nevertheless, the exception also applies because this case concerns a legal interpretation that bars the State's largest public university *and all other public institutions of higher learning* from enacting universal mask mandates. There is no evidence the pandemic is about to recede; to the contrary, the Delta variant is spreading, particularly in parts of the country, like South Carolina, with relatively low vaccination rates. Community spread is growing, and universities are an ideal place for that spread to occur and for infected persons to then spread the disease further into surrounding communities. Universal masking stops this transmission, but not so long as the Attorney General's guidance stands, and public institutions feel obligated to follow it.

The Court has emphasized that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." ATC S., 380 S.C. at 199, 669 S.E.2d at 341. Applying that standard, the Court should conclude the standing exception is appropriate here.

CONCLUSION

The petition for original jurisdiction should be granted with leave to file the proposed verified complaint. Respondents' time to respond to the petition and complaint should be shortened and any discovery and briefing expedited to allow the Court to reach a decision prior to the August 19, 2021 beginning of the Fall 2021 semester. Further, declaratory relief is warranted. The Court should hold that Proviso No. 117.190 does not prohibit the University of South Carolina or any

public institution of higher learning from enacting a *universal* mask mandate inside campus buildings and order any further relief the Court deems just and proper.

Respectfully submitted,

s/Christopher P. Kenney

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ATTORNEYS FOR PETITIONER
RICHARD J. CRESWICK

August 5, 2021
Columbia, South Carolina.

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S.C. SUPREME COURT

Exhibit A
(Petitioner's Proposed Complaint)

**IN THE ORIGINAL JURISDICTION
OF THE SOUTH CAROLINA SUPREME COURT**

Richard J. Creswick,

Plaintiff,

v.

University of South Carolina and
Alan Wilson in his official capacity as
Attorney General,

Defendants.

No. _____

**[PROPOSED]
COMPLAINT**

Plaintiff Richard J. Creswick would respectfully show this Honorable Court as follows:

JURISDICTION AND PARTIES

1. The Court has subject matter jurisdiction under article V, § 5 of the South Carolina Constitution and personal jurisdiction over all Defendants.

2. Plaintiff Richard J. Creswick is a citizen of the State of South Carolina, a resident of Richland County. He is a Professor of Physics and Astronomy and a researcher in particle astrophysics at the University of South Carolina’s College of Arts and Sciences. As such, he is expected to give in-person classroom instruction to the University’s undergraduate and graduate students at the University’s main campus in Columbia, South Carolina.

3. Defendant University of South Carolina is a body corporate and politic, in deed and in law, as provided by South Carolina Code § 59-117-40.

4. Defendant Alan Wilson is the Attorney General of the State of South Carolina.

FACTS

5. Since March 2020, the State of South Carolina has been grappling with COVID-19, a highly communicable respiratory disease caused by a novel coronavirus called SARS-CoV-2 that has spread throughout the world, including to all corners of the United States.

6. On December 11, 2020, the U.S. Food and Drug Administration issued its first emergency use authorization (EUA) for a vaccine for use by individuals 16 years of age and older to prevent COVID-19. Several other vaccines subsequently received EUA, and the United States has since obtain a sufficient supply of vaccine for every American adult to be vaccinated.

7. Nevertheless, vaccination rates in the United States and South Carolina specifically have lagged behind what public health officials had hoped to achieve to stem the spread of the virus. For instance, on August 2, 2021, THE STATE Newspaper reported that just 45% of South Carolina residents are fully vaccinated and approximately 51% have received at least one dose.¹

8. Meanwhile, variants of the novel coronavirus have been observed by public health officials in the United States and around the world.

9. One such variant, the B.1.617.2 “Delta” variant, was identified in India in December 2020 and has since spread through the world, including in the United States.

10. From June 19, 2021 to July 23, 2021, COVID-19 cases increased approximately 300% nationally, followed by increases in hospitalizations and deaths, driven by the highly transmissible Delta variant.²

11. According to Dr. Rochelle P. Walensky, the director of the Centers for Disease Control and Prevention (CDC), the Delta variant is “more aggressive and much more

¹ Bailey Aldridge and Tanasia Kenney, “COVID vaccine live updates: Here’s what to know in South Carolina on Aug. 2,” THE STATE (Aug. 2, 2021), available at: <https://www.thestate.com/news/coronavirus/article253184473.html>.

² Athalia Christie, MIA et al, “Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage,” CDC website (July 30, 2021), available at: <https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm>.

transmissible” than prior strains of the virus and is “one of the most infectious respiratory viruses we know of and that [she has] seen in [her] 20-year career.”³

12. The head of the University of Alabama at Birmingham’s Infectious Disease Division, Dr. Jeanne Marrazzo says the Delta variant is more infectious than other routine respiratory virus the United States has dealt with in our lifetime, and is more infectious than smallpox, the original SARs, and even Ebola.⁴

13. While vaccines continue to provide protection against Delta from extreme illness and death, CDC has observed fully vaccinated persons becoming infected and transmitting Delta.

14. Generally, this has caused the number of COVID-19 cases to surge throughout most of the country, including in South Carolina.

15. In response to the rising number of “breakthrough” infections driven by the Delta variant, on July 27, 2021, CDC revised its guidance concerning the use of face masks by vaccinated persons and recommended that even vaccinated people should resume wearing masks in public indoor spaces in parts of the country where the virus is surging.⁵

16. The public health authority advised (in part) that:

Emerging evidence suggests that fully vaccinated persons who do become infected with the Delta variant are at risk for transmitting it to others (2), (CDC COVID-19 Response Team, unpublished data, 2021); therefore, CDC also recommends that fully vaccinated persons wear a mask in public indoor settings in areas of substantial or high transmission, and consider wearing a mask regardless of transmission level if they or someone in their household is immunocompromised or at increased risk for severe disease, or if someone in their household is

³ Emily Anthes, “The Delta Variant: What Scientists Know,” NEW YORK TIMES (June 22, 2021), available at: <https://www.nytimes.com/2021/06/22/health/delta-variant-covid.html>.

⁴ Josh Gauntt, “Dr. Marrazzo: Delta variant more contagious than smallpox, Ebola,” WBRC Fox 6 News website (Aug. 2, 2021), available at: <https://www.wbrc.com/2021/08/03/dr-marrazzo-delta-variant-more-contagious-than-smallpox-ebola/>.

⁵ See Christie, *supra*.

unvaccinated (including children aged <12 years who are currently ineligible for vaccination).⁶

17. According to CDC, 44 of 46 counties in South Carolina—including Richland County where the University of South Carolina’s main campus is located—are recording “high” levels of community transmission of the virus.⁷

18. Meanwhile, on July 23, 2021, the University’s President, a former professor of epidemiology, Dr. Harris Pastides, sent an email communication to the University community addressing COVID-19 guidelines for Fall 2021. In relevant part, President Pastides announced:

Face Coverings:

- Face coverings will be required in the Center for Health and Well-Being and Thomson Student Health Center. They are also required on shuttles, buses and other forms of university transportation.
- Because face coverings have been proven effective in mitigating the spread of COVID-19, we encourage everyone on campus to wear one indoors whenever physical distancing is not possible. If you are not vaccinated, you are strongly encouraged to take this simple step to protect yourself and others.

19. Then, on July 30, 2021, and in response to CDC’s new July 27 masking guidance, President Pastides issued a new email directive to the University stating, in relevant part:

Beginning on July 30, the university is requiring face coverings to be worn at all times inside all campus buildings, unless you are in your own residence hall room, private office or you are eating inside campus dining facilities. You are not required to wear a face covering when you are outdoors. We will continue to keep our COVID-19 site updated with the latest information.

(Bold original, hyperlink omitted).

⁶ Id.

⁷ COVID-19 Integrated County View for July 28, 2021 to Aug. 3, 2021, CDC website (last accessed Aug. 4, 2021), available at: <https://covid.cdc.gov/covid-data-tracker/#county-view>.

20. On August 2, 2021, Attorney General Wilson sent a letter to President Pastides contending that certain budget provisos in the South Carolina Appropriation Act of 2021 bar the University from enacting a universal mask mandate on campus. A true and correct copy of the Attorney General’s letter is attached as **Exhibit 1**. The Attorney General’s letter cited Proviso Nos. 117.163 and 117.190.

21. Proviso 117.163 prohibits state-supported institutions of higher learning (like the University) from requiring proof of COVID-19 vaccination from any student as a condition of enrollment, attendance, or residence. Proviso 117.190 requires that a public institution of higher learning from requiring unvaccinated students to wear a face mask.

22. But the Attorney General’s letter concluded Proviso 117.190 prohibits the University from enacting a *universal* mask mandate for all persons—unvaccinated and vaccinated alike—inside University buildings. He claimed the proviso was “inartfully worded” but should nevertheless be read “to prohibit the mandatory wearing of masks[.]”

23. On August 3, 2021, President Pastides issued another statement concerning the University’s face covering policy, explaining (in relevant part):

Yesterday, the University of South Carolina received a legal opinion from S.C. Attorney General Alan Wilson stating that the General Assembly intended to prohibit public universities from requiring the wearing of masks in their buildings. In light of this opinion, the university will not require anyone to wear face coverings in our buildings, except when in university health care facilities and when utilizing campus public transportation, effective August 3. We continue to strongly encourage the use of face coverings indoors, except in private offices or residence hall rooms or while eating in campus dining facilities.⁸

24. Accordingly, when students and faculty return to campus for new student convocation on August 18, 2021 and in-person instruction on August 19, 2021 for the Fall 2021

⁸ Harris Pastides, “Statement on UofSC Face Covering Policy”, USC website, available at: https://www.sc.edu/safety/coronavirus/messages/2021/aug_3_statement_face_coverings.php.

semester, they will not be required to wear masks in the classroom or any other building aside from health care facilities.

25. On August 5, 2021, the Attorney General told supporters, “It’s not about science...”, in an email (**Exhibit 2**) soliciting campaign contributions as a reward for his interference in public health measures. He wrote:

The fight over vaccines and masks has never been about science or health. It’s about expanding the government's control over our daily lives. I won’t stand for it.

That’s why I stood up to University administrators when they tried to burden our students with a confusing, unlawful COVID vaccine policy. It’s why I will continue fighting to stop vaccine passports and mandates.

Say NO To Vaccine Mandates [linking to contribution page]

I believe that you, and all of South Carolina's citizens, are able to make your own choice about what is right for yourself and your family. The government has NO authority to take that freedom away from you.

The unelected bureaucrats at the CDC and liberal politicians at every level of government are determined to use the COVID crisis as an excuse to dramatically expand their interference in, and control over, every decision YOU make. They won’t get away with it.

Join me today and help me take a stand, once and for all, to preserve our liberty and keep COVID vaccine mandates out of South Carolina.

\$10 [linking to contribution page]

\$25 [linking to contribution page]

\$50 [linking to contribution page]

\$100 [linking to contribution page]

Thank you for your continued vigilance as we fight to keep our state and nation free.

Alan

Ex. 2.

26. Professor Creswick is 69 years old. He is vaccinated and he lives with his wife who is 73 years old and is also vaccinated.

27. However, Prof. Creswick’s wife is immunocompromised. Since 2020, she has been treated for breast cancer at MD Anderson. She recently finished a six (6) week round of radiation and has a procedure scheduled for Friday, August 13. She will remain immunocompromised for the foreseeable future and is therefore at high risk of contracting a breakthrough case of COVID-19 that could result in serious illness or death.

28. Prof. Creswick’s presence in the classroom with unmasked and unvaccinated students greatly increases his risk of contracting the Delta variant. Because he is vaccinated, he is unlikely to suffer serious illness or death, but accordingly to CDC’s latest observations of Delta, he *is* able to pass the virus to his wife even if he himself has no symptoms.

29. Thus, the University’s policy, as dictated by the Attorney General, is contrary to CDC guidance and unnecessarily places Prof. Creswick and his immunocompromised wife in grave danger of serious illness or death.

30. But for the Attorney General intervention in the University’s affairs, the University would (and did) enact a universal mask mandate that complies with Proviso Nos. 117.163 and 117.190 and keeps faculty, staff, and students safe from the highly infectious Delta variant.

**FOR A FIRST CAUSE OF ACTION
(Declaratory Relief)**

31. Each of the paragraphs above is incorporated here verbatim.

32. This is a concrete legal dispute of great public health importance that will affect the University of South Carolina and the faculty, staff, students, and communities surrounding the University’s eight (8) campuses located through the State of South Carolina.

33. Moreover, if left uncorrected, the Attorney General’s opinion is likely to chill other public institutions of higher learning and possibly institutions supported by public funds from following CDC masking guidance.

34. The Attorney General’s reading of Proviso 117.190 to prohibit the University from enacting a universal mask mandate is legally flawed.

35. Pursuant to article V, § 5 of the Constitution and the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 et seq., the Court should declare:

- a. The text of Proviso 117.190 is plain and unambiguous and requires no construction to discern its meaning or intent;
- b. The clear meaning and intent of the proviso simply prohibits a discriminatory masking policy that requires un-vaccinated persons to mask while the vaccinated are not subject to the same mandate;
- c. Further, the proviso does not prohibit institutions of higher learning or any institution supported by public money from enacting a *universal* mask mandate that applies equally to everyone; and
- d. The University of South Carolina’s July 27 enactment of a universal mask mandate was lawful and may be re-implemented at the discretion of the appropriate University leadership without fear of legal coercion by the Attorney General.

36. The Court should enter a final judgment declaring these rights in favor of Plaintiff and against Defendants.

PRAYER

37. Wherefore, after an expedited hearing, the Court should grant declaratory relief as set forth above and grant such further relief as the Court deems just and proper.

Respectfully submitted,

s/Christopher P. Kenney
Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, SC 29202
(803) 252-4848
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rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR PLAINTIFF
RICHARD J. CRESWICK

August 5, 2021
Columbia, South Carolina.

VERIFICATION

I, Richard J. Creswick, the Plaintiff in this matter, being of legal age and sound mind hereby swear that I have direct and personal knowledge of the allegations concerning me and my wife and that they are true and correct to the best of my knowledge.



RICHARD J. CRESWICK

SWORN TO BEFORE ME this

5th day of August, 2021

Victoria L. Eslinger
Notary Public for South Carolina

VICTORIA L. Eslinger
(print name)

My Commission Expires: 1/7/2024

Exhibit 1

(Ltr. A. Wilson to H. Pastides)



ALAN WILSON
ATTORNEY GENERAL

August 2, 2021

The Honorable Harris Pastides
Interim President
University of South Carolina
Osborne Administration Building
Columbia, SC 29208

Dear President Pastides:

We have received several inquiries regarding the validity of USC's Fall COVID-19 Testing and Masking Guidelines. The concern is whether these Guidelines violate Provisos 117.163 and 117.190 of the Appropriations Act. Proviso 117.163 prohibits institutions of higher learning receiving directly or indirectly appropriated funds to require proof of a COVID-19 vaccination as a condition of enrollment or attendance. Proviso 117.190 similarly provides that appropriated funds may not be used to require a vaccination to be present at the institution's facilities "without being required to wear a facemask." Our understanding is that the Legislature intended these Provisos to bar use of State-appropriated funds to mandate COVID-19 vaccinations or the wearing of facemasks.

As you are aware, on July 6, 2021, in a letter to the College of Charleston, we interpreted Proviso 117.163 broadly as prohibiting a university from requiring a vaccination for admission or attendance. Thus, we concluded that the school may not use coercive means or measures indirectly to mandate vaccinations.

As our universities and colleges transition to a new year, it is essential that the letter and spirit of the rule of law, as mandated by the Legislature, be followed. We note as background that the Supreme Court has recognized that a person possesses a general liberty interest in refusing medical treatment, Vitek v. Jones, 445 U.S. 480, 494 (1980) or in avoiding unwanted drugs or medication. Washington v. Harper, 494 U.S. 210, 221-22 (1990). But Due Process liberty interests must be balanced against the State's interest in health and safety in preventing contagious diseases, thereby resulting in the Court's upholding a mandatory smallpox vaccination in Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905). See Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 279 (1990). See also Op. S.C. Att'y Gen., 1963 WL 8340 (Nov. 29, 1963) [Clemson could mandate polio vaccine as condition for admission].

Here, in contrast to the foregoing authorities, the Legislature possesses the ultimate authority over health policy and has prohibited mandatory vaccinations and masking at schools and colleges, siding with a student's liberty interests. Possessing plenary power, it may do so. The University must thus adhere to the Legislature's policy, or otherwise it would have "the

The Honorable Harris Pastides
Page 2
August 2, 2021

unbridled power to . . . make its own appropriations decisions." Hampton v. Haley, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013). Thus, the Provisos are mandatory.

With respect to masks, Proviso 117.190 is ambiguous, to be sure. One reasonable interpretation is to prohibit discrimination by requiring masks for the unvaccinated. Under this interpretation, a uniform mask requirement does not violate the Proviso. Based upon this reading, we understand the University has now imposed a mask requirement "inside all campus buildings" with certain exceptions.

Such a policy, however, is likely not consistent with the intent of the Legislature. It is our understanding that Proviso 117.190, while inartfully worded, was intended to prohibit the mandatory wearing of masks, as reflected in its use of the language "without being required to wear a facemask." Our state Supreme Court has advised that "courts are not confined to the literal meaning of a statute where the literal import contradicts the real purpose and intent of the lawmakers." Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002). Given the legislative intent, we are constrained to construe Proviso 117.190 as prohibiting a mask mandate, such as the University has imposed.

Accordingly, it is important that the University not only abide by the Provisos but that it protect the constitutional liberty of students, faculty and staff. However, we further note the General Assembly did not impose a testing prohibition, indeed rejecting such. Thus, as we read the University's testing Guidelines, it is simply requiring a one-time testing requirement prior to return to campus, but has exempted those who choose to show they are vaccinated, or have tested positive for COVID within the past 90 days. We do not read this Policy as either requiring vaccinations or in coercing them. Thus, we do not believe the Provisos are violated by the testing Policy. Please confirm that the University is not imposing a Policy requiring vaccinations. Please confirm also that the University will now not require campus-wide wearing of masks, consistent with the intent of Proviso 117.190.

Of course, the rule of law is paramount. We urge the University to remain vigilant in adhering to the Provisos, as I am sure it will. Again, the University is free to encourage or promote voluntary vaccinations and masking as part of one's personal choice in order to protect the health and safety of all. We commend you for doing so and for your steadfast devotion to higher education and public health.

Sincerely,



Alan Wilson
Attorney General

cc: Terry Parham, General Counsel

Exhibit 2

(A. Wilson campaign email)

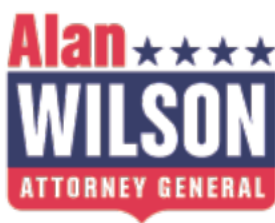
Subject: Fwd: It's not about science...

Date: Thursday, August 5, 2021 at 11:08:12 AM Eastern Daylight Time

From: [REDACTED]

To: Chris Kenney

Original Message
From: Alan Wilson <alan@wilsongsc.com>
To:
Sent: Thu, Aug 5, 2021 8:46 am
Subject: It's not about science...



[REDACTED],

The fight over vaccines and masks has never been about science or health. It's about expanding the government's control over our daily lives. I won't stand for it.

That's why I stood up to University administrators when they tried to burden our students with a confusing, unlawful COVID vaccine policy. It's why I will continue fighting to stop vaccine passports and mandates.

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[Join me today and help me take a stand, once and for all, to preserve our liberty and keep COVID vaccine mandates out of South Carolina.](#)

\$10

\$25

\$50

\$100

Thank you for your continued vigilance as we fight to keep our state and nation free.

Alan

Authorized and Paid for by Wilson for Attorney General.

This email was sent to [REDACTED]

Please add alan@wilsonforsc.com to your address book to ensure our emails reach your inbox! If you'd rather not receive emails: [Unsubscribe](#) | [Report Spam](#)

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